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Testimony of Kathleen Boundy Before Hearing on NCLB Convened by the Public Education Network January 11, 2006 in Boston, MA

I am a Boston based attorney and the co-director of the Center for Law and Education, a national advocacy organization representing students from low-income families, whose primary mission is to ensure high quality education for all students, including those with disabilities. The Center has devoted much of its 30 year history working to improve education for low-achieving students from low-income families attending Title I schools and programs covered by the Elementary and Secondary Education Act, which was reauthorized and amended by No Child Left Behind Act of 2001 (NCLB). In Massachusetts CLE provides legal advocacy and support to the legal services community representing low-income students in education related matters. CLE is currently working at two school sites (Roxbury and New Bedford) with serious achievement gaps to implement the powerful parent involvement/planning provisions in Title I/NCLB that have the potential to enable parents in collaboration with educators to become turnaround agents for poorly performing schools.

Today I have been asked to speak briefly about students with disabilities and to share some thoughts generally about whether the requirements of NCLB are working for these particular students, to identify areas of concern and areas in need of improvement. The law is based on the premises that (1) all children can learn at a high level; (2) the achievement gap (including by extrapolation, between students with and without a disability) is not acceptable; and (3) the educational system must be held accountable for closing this gap and providing all children with the education they need to achieve at high levels. Properly implemented, I believe that NCLB creates unprecedented opportunities for improving educational outcomes for students with disabilities who are receiving special education under an Individualized Education Program (IEP). States are required to establish a single system of accountability comprised of challenging standards for what all students should know and be able to do; a system of assessing whether every student has reached "proficiency" in those standards; public reporting of school data and assessment results, disaggregated not only by race and ethnicity, English proficiency, economic disadvantage, but also *disability*; and a system of interventions when student achievement is determined inadequate in meeting 'adequate yearly progress' based on the state's definition of "proficiency." In mandating these provisions, NCLB achieved what the Individuals with Disabilities Education Act (IDEA) had failed to do in 30 years – clearly establish that **virtually all students with disabilities must be taught knowledge and skills in the regular education curriculum aligned to the State's high standards that all other students of the same grade and same age are expected to learn, and through participating in required assessments aligned to the curriculum, hold their schools/districts accountable to parents for providing a quality education and for improved educational achievement.**

Today in Massachusetts, students with disabilities who have IEPs comprise about 16% of the school population. According to the MA Department of ED's own data, 78% of these students who were still enrolled in grade 12 (i.e., excludes thousands of students who have dropped out of school between grades 9 and 12) in the 2004-2005 school year attained a competency determination (required to graduate with a regular education diploma) compared to

97.7% of students not on IEPs enrolled in grade 12 in the same year. For students tested in grade 10, 29% of students with disabilities on an IEP scored “proficient” or above in English language arts and 28% scored “proficient” or above in mathematics compared to 73% of their 10th grade non-IEP peers who scored “proficient” or above in English language arts and 68% or above in mathematics. While the proficiency rates of students with disabilities in all grades tested reflected increases in proficiency over a five year period, it is more significant that there has been little evidence of gain during the last three years (except 10th grade math in which the proficiency rate has increased each year).

As evidenced by the above statistics, the gap in learning to standards is quite significant and persistent between students with disabilities on an IEP and students without. To begin to address this deficit effectively, students with disabilities, as all other low achieving students, their parents and advocates must be encouraged to take advantage of NCLB, in particular, the key provisions handed down from the 1994 amendments to Title I that focus most directly on strategies for implementing the substantive legal core requirements of the Act that give meaning and definition to a high quality public education. For this realistically to occur, the parents of students with disabilities must, in a manner similar to their involvement under IDEA, actively engage in implementation of the critical parent participation and planning provisions under NCLB.

Drawing upon CLE’s school site model as an example, and following the parent involvement and planning provisions of NCLB/Title I, parents of students with disabilities should take steps to develop and agree upon a stronger parent involvement policy that will describe how their respective school’s program plan will jointly be developed and how parent knowledge and capacity for participation will be built so parents are effective participants in developing the school plan. The school plan should, as required, describe how the school will provide key elements of program quality, including, an accelerated and enriched curriculum aligned to the state content and school learning standards; effective instructional methods that enable all children to achieve the learning goals, provided by instructional staff who are highly qualified to enable all their students to achieve those goals, and who in turn regularly participate in ongoing, intensive professional development that improve their capacity to do so; individual attention when a student experiences difficulty with particular learning goals, including effective methods for addressing the child’s particular learning needs and timely and effective intervention whenever the child is experiencing difficulty in mastering any of the learning goals; ongoing, accurate assessment of the extent of the child’s mastery of the learning goals, that: uses multiple methods for allowing all students, irrespective of individual needs, including disability based, to fully demonstrate what they know and can do, is an integral part of the classroom instruction, and is used to improve teaching and learning; and adequate resources, structures, and processes. Instead of fleeing the school for one of a limited selection of increasingly crowded schools that has made acceptable progress, our expectation is that parents will work with teachers and administrators to attain a quality education for all students, to address the educational deficits and to close the gap in learning for all subgroup students, including students with disabilities.

Given the premises on which NCLB is grounded, it is especially disappointing that in the current climate these mandated school level planning and participation policies that were specifically designed to build a learning community and deliver high quality education to all students are receiving so little attention. The focus of Massachusetts, as most other states, has almost exclusively been on identifying underperforming schools based on benchmarks that trigger consequences that are widely perceived as punitive. This perception is not unwarranted, as consequences for non-compliance are imposed without adequately ensuring that the underperforming school and/or district have the capacity to respond to their need for improvement – i.e., to implement the legal requirements for a jointly developed and parent approved parent involvement policy to provide the structure for working on a school plan for providing *all* students, in particular those most in need, the required core elements of a quality education. Nor has the State evidenced that it has the capacity to provide or obtain necessary technical assistance, fiscal and other resources, professional development opportunities, and to meet its legal responsibilities to assist underperforming schools in undertaking steps for improvement, including complying with the legally required parent participation and planning provisions for providing a quality public education to all students. The impact on the underperforming

schools and, in particular, their low-achieving students who are disproportionately racial and language minorities, poor, and students with disabilities, is exacerbated by Massachusetts' high-stakes assessment. It is no coincidence that state data reflect unacceptably high numbers of students, who are disproportionately low achieving, poor, racial and ethnic minorities, students with limited English proficiency, and students with disabilities, being 'pushed out' of poorly performing schools through suspensions and expulsions, transfers to alternative schools, and dropping out. These same students have also likely already been victimized by the effects of narrowing the curriculum, teaching to the 'high-stakes' test, and reliance on a single test and absence of multiple measures of student knowledge and skills, etc. –outcomes rooted in no small measure in a failure to understand and implement what the Act actually calls for.

The heightened sense of urgency created by target dates for meeting proficiency and the AYP provisions of NCLB is being misused, and has already resulted in harmful consequences for students with disabilities at both the national and state level. Instead of using the benchmarks of underperformance as indicia of need for continuous improvement, and as triggers for ensuring compliance with the actual legal requirements to have a jointly developed, adequate plan incorporating the elements of a quality education under Title I, the federal and state response has been to accommodate state and local desire for more loopholes at the expense of students – none more so than students with disabilities. *First*, the U.S. Department of Education reacted to criticism from overwhelmed states and school districts level by authorizing *reconsideration or increased flexibility* of NCLB's mandate to include *all students*, including those with disabilities. By regulation the Department carved out an exception for up to 1% of all students assessed having the most significant cognitive disabilities [approximately 9% of students with disabilities], authorizing their performance on an alternate assessment based on different standards to be counted as proficient for AYP purposes if they have met an "alternate achievement standard" which is "an expectation of performance that differs in complexity from a grade-level achievement standard." Less than 18 months later, the Department issued a more myopic policy. This latter policy, for which proposed regulations have recently been published, permits an additional 2 percent of all assessed students, or about another 20 percent of students with disabilities, to be counted as proficient under the NCLB formula for determining AYP if they take tests based on "modified standards." There is no question but that special care will be necessary to avoid the "slippery slope" that will lead to cumulative deficits and more students with disabilities left behind.

Second, the State of Massachusetts made a deliberate choice *not* to count students with disabilities in determining school performance by increasing the minimal threshold size, the "n" that must be met before a subgroup "counts" in calculating AYP. When Massachusetts elected to increase its "n" from 20 to 40 (2002-2003), the number of schools and districts reported as not meeting AYP presumably would be expected to drop though not necessarily because there was any improvement in learning outcomes, but *because the subgroup of students with disabilities were not counted, as their number did not equal or exceed 40*. Despite Massachusetts' having a significantly higher percentage of students identified as receiving special education under an IEP (16%) than the national average (11%), a large majority of MA schools that made AYP in 2004 and 2005 did so without having to demonstrate that students with disabilities, as a subgroup, met the state standards of proficiency. Only 63% of MA school districts have a special education subgroup (n=40), and of those 45% made AYP for the special education subgroup in English/language arts and 37% made AYP for the subgroup in mathematics in the 2004-2005 school year. Thus, significant numbers of students with disabilities, who receive special education in one of the 129 MA districts not having a subgroup, are excluded from NCLB's accountability provisions. States are authorized to establish a threshold to improve statistical reliability and to prevent a small number of students in a particular subset from causing a school or district to fail to meet AYP, and to protect individual privacy. Doubling and tripling the "n" size to manipulate outcomes should not be permitted. Query too whether the State's failure to examine the schools and districts failing to count a subgroup of struggling students with disabilities, who are at minimum in need of individual assistance, is relevant to the State's flat performance and inability to improve the proficiency rate of students with disabilities during the last three years?

Despite the many impediments to effective implementation of NCLB, parents of students with disabilities should have legitimate heightened expectations based on using the Act's key provisions to ensure their children with disabilities receive a high quality education while pursuing such individual advocacy as may be needed under the recently reauthorized IDEA that purposefully aligned with NCLB to improve school accountability to students and parents.

Students with Disabilities: Some specific issues and Concerns

- **Standards: All students with disabilities are still not being taught to high level and sufficiently comprehensive standards.** Despite the mandates of NCLB and IDEA and the serious consequences accompanying Massachusetts' use of a high-stakes test since 2001, evidence, including State assessment data, monitoring reports, audits, find-finding reports, and school and school district reviews, show that significant numbers of students with disabilities are still not being provided the opportunities to learn to the rigorous content rich standards set for all students. To assist students overcome any disability related obstacles that impede learning, schools must convey their expectation that all students can learn to the same standards set for all. Students must be provided individualized accommodations, adaptations, specialized instruction, services, and supports designed to enable them to have meaningful access to the SAME challenging academic content their same grade peers are receiving. They must be provided high quality instruction by highly qualified teachers knowledgeable about specialized instruction and the academic discipline in the SAME challenging academic content their same grade peers are receiving. Being included in high quality authentic assessments with accommodations helps guarantee this outcome.

The Massachusetts academic content and achievement standards are nationally touted as being of high academic quality in at least English language arts, mathematics, and science. Yesterday the Alliance for the Whole Child issued a thoughtful report urging reconsideration and amendment of Massachusetts' standards. The report argues that the State standards for all children are too narrow with their focus on English language arts/reading, mathematics, and science, and that standards relating to a child's social, emotional and physical well-being ought to be included to support the development of the whole child. Such broader standards would encourage schools to ensure that every child has access to a richer array of subjects, including social studies, world languages, art, music, physical education, and recess in addition to English language arts, mathematics and science.

MA DOE makes available on its website substantial evidence collected by the State based on NCLB, IDEA and state law that should be used by advocates and parent or school community groups to identify schools and districts where students with disabilities remain at risk of not effectively learning and where both the school and the child require timely effective interventions. State and federal monitoring reports, state compliance audits, school fact-finding reviews and school district examination reports, as well as drop-out, exclusion and graduation data are all sources of information that attest to students with disabilities continuing to be denied a free appropriate public education consistent with the State education standards required by IDEA, section 504 and NCLB. LEA placement data continues to reveal far too many students' exposure to low expectations and limited opportunities to learn to high standards in the general education curriculum. District report cards provide critical information about highly qualified teachers, school discipline and possible push-out problems.

- **Testing of students with disabilities: Need to Use Multiple Measures in Assessment.** In Massachusetts approximately 16% of students are identified as having disabilities and requiring special education. More than half of those students are classified as having specific learning disabilities; fewer than 9% of all students with disabilities have severe cognitive disabilities that would prevent them even with the best instruction from attaining the State standards set for all. The remaining 90%+ of students in all grades tested having mild or no cognitive

disability, nonetheless, failed to pass the 2005 State assessment at a rate 6 times that of their non-disabled peers.

For the class of 2004-2005, 77.8% of those students with disabilities on IEPs in grade 12 (i.e., not including thousands of drop-outs from grades 9-12) achieved a competency determination compared to 97.7 % of non-IEP students enrolled in grade 12. The number is notable because it reflects a downward trend in the percentage of students with disabilities who have attained competency determinations from 85% in the 2002-2003 school year, 84% in 2003-2004, and 78% in 2004-2005. The Department explains the decrease on the Class of 2004-2005's being the first to include all residential and out-of-district day students. This explanation should be explored further especially given that each year the students who are participating in the assessment have been educated another year in the school district.

This high rate of failure –at least to the extent it has persisted at the higher grades- can in part be attributed to Massachusetts' failure to assess students using multiple measures, specifically to permit students with disabilities, who have failed the regular MCAS even with accommodations, to demonstrate what they know and can do through the State's Alternate Assessment, a performance assessment. The MCAS Alt is well respected – a portfolio assessment that is more labor intensive requiring one-to-one administration, which technically will allow any student to demonstrate mastery of the State academic content and achievement standards. Currently use of the Alternate Assessment is unnecessarily restrictive, as only those students with the most significant cognitive disabilities and students, whose disabilities make them incapable of taking the regular State assessment even with accommodations, take the MCAS-Alt. Costs and time considerations, while relevant, should not prevail when a student has demonstrated an inability to be successful on the regular assessment and can better demonstrate what he knows and can do through a portfolio assessment.

Consistent with the requirements of Title I and the regulations as well as the APA Joint Testing Standards, all students, including but not limited to students with disabilities, ought to be assessed using multiple measures. The assessments should provide a range of ways for students to demonstrate proficiency, so that inferences drawn about the students' levels of proficiency are as valid and reliable as possible. The assessments ought to provide useful information concerning areas of strength and weakness, in terms of the expected skills and knowledge, in order to help guide instruction, individual attention, and school improvement. They should be designed and used in ways that stimulate, rather than discourage, innovative ways of teaching and learning. Furthermore, it is essential that use of the multiple assessments is valid and reliable for all identifiable populations – including students with limited English proficiency, students with disabilities, different racial/ethnic groups, different socioeconomic groups, and gender.

Finally, students with disabilities must arguably be provided with accommodations and adaptations in the assessment and assessment process that will ensure the validity and reliability of the assessment results by allowing them to best demonstrate their proficiency in the relevant skills and knowledge. Students with disabilities must also be provided with any modification, accommodations, or adaptations that are needed to overcome the barriers that their disabilities may pose to demonstrating those skills and knowledge.

- **Parent Communities are not adequately involved in school improvement efforts as required by NCLB making schools less accountable to parents.** CLE is disturbed by the minimal implementation of the parent involvement provisions of the law that are key to holding the educational system accountable to parents for closing the gaps in academic achievement between children of color and white children, rich and poor, with and without disabilities, and for providing all students with the education they need to achieve at high levels. The problem lies not in the law, but in its poor implementation at the State, district and school levels where despite research showing the relationship between parents engaged in their children's learning and improved educational outcomes, there is little or no leadership or focus on engaging parents from the get-go as partners in their

children's education. The state shares responsibility for insuring local compliance with these legally mandated Title I provisions on program quality and parent involvement.

- **Schools and school district are not provided necessary resources to be accountable for delivering high quality instruction and services.** Schools and school districts needing improvement ought to be provided meaningful technical assistance, professional development opportunities, and resources to address identified but unmet areas of need. For example, some schools require additional resources, site based expertise and professional development opportunities to effectuate an accelerated and enriched curriculum for those students whose learning is deficient because they have not been effectively taught or have been deprived of opportunities to learn, despite their being capable of learning and making progress toward the standards set for all. Students with disabilities and other members of the protected subgroups, who are not currently functioning or receiving instruction at grade level, require effective instruction from highly qualified teachers, who may also need to concurrently receive intensive, ongoing high-quality staff development. Also, consistent with both NCLB and IDEA, students must be provided effective assistance whenever the student is experiencing difficulty mastering any of the standards. This is not happening for students with disabilities.
- **Supplemental educational services and remedial or compensatory education often deny students with disabilities the specialized instruction they need to benefit from the course of instruction.** Students with disabilities –in particular those who are behind grade level, failed to meet standards and/or to pass the high stakes test, and who receive specialized instruction, may require effective instructional assistance provided by a highly qualified teacher who has special education knowledge and skills so as not to be constructively excluded from the teaching and learning –regardless whether it is provided during or after the school day has ended or at summer school. Students with disabilities, who fail the State's high-stakes exam or who wish to address educational deficits in particular areas of learning, are often directed to in-school remedial programs, summer school or after school remediation and tutoring programs where there is no provision for special education. Special education is not a curriculum or a place but is defined as 'specialized instruction' that should be available in every public school offering so as not to constructively exclude students with disabilities from learning opportunities available to all other children, but not provided for in their IEPs.

NCLB has been the target of considerable criticism from state and school officials, parents, and the media. Despite widespread criticism primarily relating to over-reliance on a single assessment and its consequences, the statute contains explicit legal requirements designed to deliver core elements of a quality education for all students, including students with disabilities receiving special education, through a jointly developed school plan that makes schools directly accountable to parents for improving their children's education. These latter substantive core requirements of Title I must neither be weakened nor ignored. NCLB's accountability provisions establishing targets and benchmarks should be properly used to identify and respond to the needs of schools needing improvement, to ensure that they have the capacity, including resources and technical assistance to address their needs, and to ensure they are in compliance with the legal requirements governing the development of an adequate school plan, jointly developed with parents that provide the core elements of quality education for all students, and a parent-approved parent involvement policy to provide the on-going structure to continue to work on improving the school plan.